IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

FAO (HMA) No.285 of 2002.
Reserved on:17.07.2007.
Decided on:July 19, 2007

Sawarn Dass ***.....Appellant.***

VERSUS

Santosh @ Santo ***.....Respondent.***

Coram

The Hon'ble Mr.Justice Kuldip Singh, Judge.

Whether approved for reporting?[1] No

For the Appellant: **Mr.Subhash Sharma, Advocate.**

For the Respondent: **Mr.N.K.Thakur, Advocate.**

Kuldip Singh, Judge

The petitioner / husband is in appeal against the judgment, decree dated 1.6.2002 passed by learned District Judge, Una in HMA Petition No.6 of 1997 whereby the learned District Judge has dismissed the petition of the husband for a decree of divorce on the grounds of adultery, cruelty and desertion of the wife. The parties are referred in the same manner as in the trial Court.

2. The brief facts are that marriage between the parties was solemnized on 20.3.1988 at village *Bathu, Sub Tehsil, Haroli, District Una.* A male child, namely, Avtar Singh was born from the wedlock of the parties on 4.8.1990.

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[1] ***Whether the reporters of the local papers may be allowed to see the Judgment ?Yes***

3. The further case of the husband is that respondent / wife was earlier married to Relu Ram and from that wedlock two children, namely, Ms.Usha and Satpal were born to her. After the death of Relu Ram, respondent married with petitioner. The petitioner has one daughter also named Ms.Usha from first wife.

4. The respondent gave birth to male child, namely, Avtar Singh at her parents' house on 4.8.1990. The respondent and newly born child Avtar Singh were brought to village Lalri of the petitioner. The respondent stayed there for about seven months and thereafter left the matrimonial home in January 1992 leaving behind the children. The respondent after January 1992 did not return to her matrimonial home, nor she had physical relations with the petitioner.

5. The respondent filed an application under Section 125 Cr.P.C. for maintenance against the petitioner. In those proceedings, at the instance of petitioner, she was medically examined and found to be carrying pregnancy of 28-30 weeks. Later on she delivered male child, namely, Jaswinder after five months of her medical examination. Jaswinder is not son of petitioner. It has been alleged that the respondent is leading a life of prostitute.

6. The respondent has treated the petitioner with cruelty. She was in the habit of taking quarrels on petty matters till she stayed with petitioner. The petitioner had to cook meals for whole of the family including the respondent. The brother of the respondent gave

beatings to the petitioner at her instance. The respondent has illicit relations with other persons.

7. The petitioner has also pleaded that respondent has deserted him since middle of January 1992. The desertion of respondent is for a continuous period of not less than two years prior to the filing of the petition.

8. The respondent contested the petition and took preliminary objection that the petition is not maintainable and the same has not been filed in accordance with the rules. On merits, she has denied the allegations made in the petition. She has alleged that she was turned out from the matrimonial home in January 1992 after giving her merciless beatings. The petitioner never bothered to provide her maintenance. She was impregnated by petitioner during the subsistence of their marriage. She has denied that she has deserted the petitioner. The learned District Judge dismissed the petition on 1.6.2002 and, therefore, the husband is in appeal.

9. I have heard the learned counsel for the parties and gone through the record.

10. The learned counsel for the husband / petitioner has submitted that learned District Judge has erred in dismissing the petition. The husband has proved that the wife is living in adultery, she has treated the petitioner with cruelty and has also deserted him. The learned counsel for the respondent / wife has submitted that the petition has been filed by the petitioner on the ground of adultery,

alleged adulterer has not been impleaded as a party. Hence, petition on the ground of adultery is not maintainable. The learned District Judge has rightly appreciated the material on record. He has supported the impugned judgment and decree.

11. The petitioner has appeared as PW-1 and has stated that after the birth of Avtar Singh, he brought the respondent and the son back to his home from her parents' house. She stayed with him for about 2-3 months and thereafter she again went to her parents' house. She delivered a child 14 months after she left the matrimonial home, during this period he did not have sexual intercourse with her. The respondent is living with her parents for the last 12-13 years. PW-2 Onkar Singh has stated that in the year 1990 he accompanied petitioner for bringing respondent back from her parents' house but respondent refused to accompany the petitioner. Ext.P-1 is the certified copy of application under Section 125 Cr.P.C. and Ext.P-2 is the order dated 31.1.1994 passed by the learned Additional Chief Judicial Magistrate, Una in case No.3/92 on the application of Santosh etc. under Section 125 Cr.P.C. Respondent examined herself as RW-1. She has stated that from petitioner she has given birth to three children, out of them one male child had died and two sons Jaswinder and Avtar Singh are alive. The petitioner turned her out from the matrimonial home in January 1992 after giving beatings. The petitioner has levelled false allegations against her. In these circumstances, she is living with her parents.

12. It is common case of the parties that after their marriage a son Avtar Singh was born to respondent from petitioner. The dispute is about the legitimacy of Jaswinder, who, according to the petitioner, was born to respondent 14 months after she left the matrimonial home of the petitioner in January 1992. The marriage between the parties is admitted. The petitioner has failed to prove non access after the wife allegedly left matrimonial home in January 1992. There is presumption of legitimacy of a child born during the subsistence of the marriage under Section 112 of the Evidence Act. The petitioner has levelled vague allegations that Jaswinder is not his son. The respondent has specifically stated on oath that Jaswinder was born to her from the petitioner. The learned District Judge has rightly appreciated the material on record. The petitioner has miserably failed to prove the allegation of adultery. Moreover, the petitioner has not impleaded alleged adulterer as a respondent in the petition, which is requirement of Rule 7 of the Hindu Marriage and Divorce (Himachal Pradesh) Rules, 1982. It is not his case that he is not aware of the name and address of the alleged adulterer.

13. The petitioner / husband has virtually led no evidence regarding alleged cruelty of the respondent. In his statement, he has not uttered a word regarding the alleged cruelty of the respondent / wife towards him. The allegation of cruelty has not been established by the petitioner. The learned District Judge has rightly decided the issue of cruelty against the petitioner.

14. The petitioner has also failed to prove the issue of desertion. The respondent has submitted that she was turned out from the matrimonial home in January 1992 by petitioner after giving beatings. She has also stated that the petitioner has levelled false allegations against her. It is not safe for her to live with him. The petitioner has nowhere stated in his statement that the wife has deserted him and she has no intention to continue the matrimonial tie and has no intention to come back and join the company of the petitioner. The respondent has given reasonable explanation to live separately. The petitioner has levelled allegations of adultery against the respondent which he has failed to prove. On the face of such type of allegations, the respondent is not expected to live with the petitioner. The petitioner has failed to prove factum of desertion as well as animus on the part of the respondent to break the matrimonial tie permanently. The learned District Judge has appreciated the material on record rightly. The learned counsel for the petitioner / husband has failed to point out any legal defect in the impugned judgment and decree.

15. The result of above discussion is that the appeal is dismissed. No costs.

(Kuldip Singh)
Judge.

July 19, 2007
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